

COMMERCIAL RULE OF LAW

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Findings

- Industrial policy continues to play an important role in the Chinese economy, guiding important sectors such as automotive, software, and “cultural industry.” These industrial policies are comprehensive frameworks for development in key sectors of the Chinese economy, providing for subsidies and other benefits, plans for restructuring the state-owned companies in the relevant sector, and export goals. The use of industrial policies, especially in key sectors, was supplemented by China’s 12th Five-Year Plan, which sets out certain “strategic emerging industries” for support, including energy conservation, new-generation information technology (IT), biotechnology, high-end equipment manufacturing, new energies, new materials, and new-energy vehicles. Further, the Ministry of Industry and Information Technology and other government departments have issued sector-specific plans.
- China’s state-owned sector enjoys preferential treatment, crowding out private companies in certain key sectors. This can act as a barrier to legal development and the rule of law, as the state controls the companies, the courts, the legislatures, and administrative departments. China’s industrial policies encourage the transfer of technology to the state-owned enterprises (SOEs), and their consolidation into “domestic champions.” SOEs also enjoy various direct and indirect subsidies.
- Chinese legislation is vague as to whether information concerning the SOEs falls under China’s rules on commercial secrets or the PRC State Secrets Law. This was highlighted in the case of Xue Feng, a U.S. citizen who was arrested in China for helping his U.S.-based employer purchase a commercial database in China. The database was not classified as a state secret at the time of the transaction. Xue was sentenced to eight years’ imprisonment in China for violating China’s state secrets law, and his sentence was upheld on appeal in February 2011.
- China has been a party to several World Trade Organization (WTO) cases since acceding to the WTO in December 2001, and there were six active disputes against China in 2010. The WTO found against China in a case it brought challenging the United States’ imposition of tariffs on certain auto and truck tires under the transitional product-specific safeguard provision in China’s Protocol of Accession. The United States brought a case against China concerning its provision of subsidies to the domestic wind energy industry, which is pending. China appealed a WTO decision that China’s restraints of exports of bauxite, coke, fluorspar, magnesium, manganese, sil-

icon carbide, silicon metal, yellow phosphorus, and zinc are not consistent with China's obligations under the WTO.

- The value of the Chinese yuan continues to be a subject of concern to policymakers inside and outside China.
- Chinese government departments closely regulate foreign investment in China and use the approval process to ensure that foreign investment is in keeping with government policy. During the Commission's 2011 reporting year, Chinese authorities issued a revised draft of the Foreign Investment Guidance Catalogue, which lists industries in which foreign investment is encouraged, restricted, or forbidden. The revised catalogue includes provisions listing as "encouraged" the strategic emerging industries covered in the 12th Five-Year Plan.
- Chinese outbound investment has grown, with much of the growth concentrated in investments in energy and minerals needed for Chinese manufacturing. Outbound investment is regulated by the Ministry of Commerce (MOFCOM) and the National Development and Reform Commission (NDRC). The State-Owned Assets Supervision and Administration Commission issued new measures regulating offshore financial activities by the state-owned enterprises (SOEs). Outbound investments are financed by loans from China's state-owned banks, outbound investment funds, and use of renminbi reserves.
- Two of the three Chinese government departments in charge of implementing the PRC Antimonopoly Law (AML) issued new AML regulations during the 2011 reporting year. The State Administration for Industry and Commerce passed three sets of regulations on monopoly agreements, abuse of dominance, and abuse of administrative power, and the NDRC issued two sets of regulations on price monopoly. The five sets of regulations became effective on February 1, 2011.
- MOFCOM, which handles AML merger reviews, has held up approval of mergers of non-Chinese entities outside China during this reporting year, including Nokia's purchase of certain of Motorola's network assets, and the merger of two Russian potash companies. There have been no reports of MOFCOM not approving, or giving only conditional approval to, mergers between Chinese companies; however, the State-Owned Assets Supervision and Administration Commission has been encouraging the consolidation of the SOEs in China, a process which some industrial policies, such as that for the auto industry, mandate.

Recommendations

Members of the U.S. Congress and Administration officials are encouraged to:

- Develop and support a project surveying the role of China's industrial policies in the Chinese economy from the perspective of WTO requirements, including how the development of these policies, and the role they play in directing China's economy, impact the development of transparency, rule of law, and China's compliance with its international legal commitments.

- Request through the Open Government Information office at the Ministry of Commerce, or through bilateral dialogues between the U.S. Department of Justice and the Federal Trade Commission and their Chinese counterparts, details on merger applications reviewed since the PRC Antimonopoly Law came into effect, including the number of applications involving non-Chinese companies, the number of applications involving state-owned enterprises, and the results of each of the merger reviews.
- Through bilateral dialogues between (1) the U.S. Trade Representative and U.S. Department of Commerce and (2) China's Ministry of Commerce, National Development and Reform Commission, and State-Owned Assets Supervision and Administration Commission, obtain details on the amount of Chinese investment (other than in financial instruments) in the United States, the criteria Chinese authorities use in making approval decisions concerning such investment, and how such investment is financed.
- Arrange for Chinese authorities to clarify the approval procedure applicable to foreign investment in China, including how the security review procedure relates to the regular review procedure applicable to all foreign investment in China under the auspices of legal exchanges such as the U.S. Legal Exchange under the Joint Commission on Commerce and Trade.

Introduction

As a member of the World Trade Organization (WTO), China is bound by commitments outlined in both the WTO agreements and China's accession documents.¹ China must abide by obligations that prohibit it from discriminating among WTO members or from discriminating between foreign and Chinese goods, services, and intellectual property rights. China must adhere to WTO obligations to publish promptly all laws, regulations, judicial decisions, and administrative rulings related to trade in goods, services, trade-related intellectual property rights, or control of foreign exchange. While China has taken many steps to open its economy and reform its legal system since acceding to the WTO in December 2001, it has not fully met its commitments.² According to the United States Trade Representative (USTR), "in some areas, it appears that China has yet to fully implement important commitments, and in other areas, significant questions have arisen regarding China's adherence to ongoing WTO obligations, including core WTO principles."³ For example, China has failed to adhere to the WTO's transparency principle, and this in itself has made it difficult for other WTO members, including the United States, to monitor China's overall WTO compliance.⁴ China agreed when it acceded to the WTO to begin negotiations to join the Government Procurement Agreement (GPA) "as soon as possible."⁵ It has not yet done so. USTR notes that China is moving slowly toward joining the GPA, while "maintaining and adopting government procurement measures that give domestic preferences."⁶

The USTR has indicated that problems in China's WTO compliance can be traced to China's use of industrial policies and "government intervention intended to promote or protect China's domestic industries and state-owned enterprises."⁷ The Chinese government's use of industrial policies to direct economic growth, rather than relying on market-based principles, both hinders development of the rule of law⁸ and limits the access of non-Chinese companies, including those from other WTO members, to the Chinese market,⁹ thereby violating the core WTO principle of national treatment.¹⁰

Chinese government departments' use of industrial policies has been accompanied by, and in some cases provides for, the growth of the state sector in the Chinese economy,¹¹ a trend called "the state advances, the private sector retreats."¹² It is not clear that a large state-owned sector is compatible with rule of law. The state, as the main shareholder, controls the courts, the police, and the legislature, which renders equal treatment before the law and an independent judiciary impossible.¹³

Transparency

In its Protocol of Accession to the WTO, China committed to publish all laws, regulations, or other measures affecting trade (with certain exceptions), to allow a reasonable comment period before implementation, and to establish or designate an official journal for this purpose.¹⁴ USTR notes in its 2010 report on China's WTO compliance that China's implementation of its WTO transparency obligations has been uneven.¹⁵ In its April 2011 PRC Transparency Tracking report, the US-China Business Council reported that reg-

ulatory transparency remains one of the top concerns of the council's member companies.¹⁶ This was raised at the May 2011 meeting of the U.S.-China Strategic and Economic Dialogue (S&ED), and China agreed to issue a measure in 2011 requiring publication in most cases of all proposed measures related to trade and economics on the Web site of the State Council Legislative Affairs Office for a 30-day comment period.¹⁷ At the S&ED, China and the United States broadened discussions of transparency to encompass provision of export credits and arrangements for export financing.¹⁸ China has two official export credit agencies (ECAs), China Eximbank and Sinosure, and the state-owned policy bank, China Development Bank, performs a function similar to that of an ECA.¹⁹ As China is not a member of the Organisation for Economic Co-operation and Development (OECD), China's ECAs are not required to adhere to the standards set out in the OECD Arrangement on Export Credits, which includes provisions for consultation and exchange of information on export credit offers.²⁰ (Eximbank's Export Seller Credit program typically supports "exports of 'national champion' companies that are oftentimes State Owned Enterprises (SOEs) as well.")²¹ At the S&ED, China also committed to "steadily increase its solicitation of public opinions on regulatory documents with a direct influence on the rights and obligations of citizens, legal persons, or other organizations."²²

State-Owned Enterprises and the Communist Party

China's state-owned sector continues to enjoy preferential treatment, crowding out private companies in certain key sectors.²³ State-owned enterprises (SOEs) enjoy a number of direct and indirect subsidies, some of which violate China's WTO commitments. [For a discussion of the WTO case against China concerning its subsidies in the wind energy industry, see China and the World Trade Organization in this section.] According to an American economist, "SOEs operate within markets but they operate primarily within state-controlled markets. This regulatory protection is the most powerful subsidy many SOEs receive."²⁴ Further, the government plays a key role in allocating inputs to production, such as land, financing, resources, and corporate management.²⁵ Through ownership of land²⁶ and the SOEs, the state held 76 percent of productive wealth in China at the end of 2006.²⁷ According to a Yale University expert, this is a "[b]arrier to legal development and the rule of law."²⁸

SOES AND COMMERCIAL SECRETS/STATE SECRETS

One area in which SOEs may receive extra protection is the application of state secrets rules. Chinese legislation on state secrets is vague as to whether information concerning the SOEs falls under China's rules on commercial secrets²⁹ or the PRC State Secrets Law.³⁰ This creates potential risks for individuals and companies competing or contracting with the SOEs or trying to obtain information on sectors controlled by the SOEs.³¹ Under Chinese law, a commercial secret can be elevated to a state secret when the information is not publicly available and if "state interests are in-

volved.”³² Further, the use of such legislation to protect secrets in a way to benefit the SOEs may raise trade issues.³³

The importance of this lack of clarity was highlighted in the 2010 case of Xue Feng, a U.S. citizen who was charged with violating the State Secrets Law when he helped his U.S.-based employer purchase a commercial database in China. The database was not classified as a state secret at the time of the transaction.³⁴ In February 2011, a Chinese court upheld Xue’s sentence of eight years’ imprisonment.³⁵ The New York Times noted, “Some analysts have viewed Xue’s prosecution as a reflection of China’s sensitivity to matters regarding natural resources.”³⁶

SOES AND THE PARTY

As government-owned entities, SOEs are closely linked to the Communist Party. State Council regulations provide for building primary Party organizations in the SOEs pursuant to the Party constitution.³⁷ Further, the Party is active in management of the SOEs, including through appointment of senior management by the Party’s Central Organization Department, which appoints personnel for all important jobs in China.³⁸ There are also reports of Party organizations in the overseas operations of SOEs.³⁹ According to one Chinese article, “Any major Party activity happening in the mainland shall be executed simultaneously overseas.”⁴⁰

Industrial Policy

Industrial policy continues to play an important role in the Chinese economy, guiding important sectors such as the automotive, software, and “cultural” industries.⁴¹ China’s industrial policies encourage the transfer of technology to, and consolidation of, the SOEs, and creation of “domestic champions.”⁴² In March 2011, the National People’s Congress passed the PRC Outline of the 12th Five-Year Plan on National Economic and Social Development (12th Five-Year Plan), which supplements current industrial policies by prioritizing seven “strategic emerging industries” for development over the coming five years. These industries—energy conservation, new generation information technology (IT), biotechnology, high-end equipment manufacturing, new energies, new materials, and new energy vehicles—will enjoy preferential tax and financial policies.⁴³ Since issuance of the 12th Five-Year Plan, the Ministry of Industry and Information Technology and other government departments have issued sector-specific plans.⁴⁴

To promote the development of the information technology (IT) industry, in January 2011, the State Council issued a circular on encouraging the development of the software and integrated circuit (IC) industries, providing for various incentives to improve the environment for these industries.⁴⁵ The circular is a supplement to a document the State Council passed in 2000,⁴⁶ which subsequently was revised to settle a WTO dispute the United States brought against China.⁴⁷ ICs and software are included as “encouraged investments” in both the 2007 and the draft 2011 Foreign Investment Guidance Catalogue,⁴⁸ with an additional entry in the 2011 draft for next-generation Internet.⁴⁹

Intellectual Property Rights

Chinese authorities' enforcement of intellectual property rights (IPR) continues to be poor, notwithstanding government campaigns, crackdowns, and commitments.⁵⁰ Poor enforcement is combined with government policies to compel foreign companies to transfer technology to entities in China in exchange for market access. Further, U.S. businesses have continued to express concerns that Chinese authorities are using technical standards⁵¹ and the PRC Antimonopoly Law as tools to acquire foreign technology and other forms of intellectual property.⁵²

During the 2011 reporting year, the Chinese government took some actions to improve enforcement of IPR. The State Council launched a six-month campaign starting in October 2010 to combat the manufacture and sale of counterfeit and shoddy goods.⁵³ In March 2011, the government extended the campaign an additional three months.⁵⁴ In December 2010, nine central-level government departments issued a notice on stopping the sale of such goods online.⁵⁵ In March 2011, the Chinese search engine Baidu announced plans to address copyright infringement through its Web site.⁵⁶ There have been reports of greater IPR protection in certain industries subject to industrial policy, including a campaign to enforce IPR in Shanghai's cultural markets⁵⁷ and protection of IPR in software and integrated circuits under the policies for development of the software and integrated circuit industries. [See Industrial Policy in this section.]⁵⁸ However, infringement of IPR continues to be a major challenge for Chinese consumers⁵⁹ and for U.S. companies operating in China.⁶⁰

The Office of the U.S. Trade Representative kept China on the Priority Watch List in its 2011 Special 301 Report because of "ongoing concerns about the prevalence of piracy and counterfeiting in China, and China's implementation of 'indigenous innovation' and other industrial policies that discriminate against or otherwise disadvantage U.S. exports and U.S. investors."⁶¹ During the 2010 meeting of the Joint Commission on Commerce and Trade (JCCT), China agreed to carry out special campaigns on IPR enforcement and to "actively work to advance software legalization," and to address certain other issues in IPR protection.⁶² President Hu Jintao made additional commitments on IPR protection during his visit to Washington in January 2011, including an agreement for funding and auditing the use of licensed software by the Chinese government and for promoting the use of licensed software by private companies and state-owned enterprises.⁶³ In February, according to Chinese press and government reports, the Chinese government agreed that by the end of May 2011, all central government departments would use legitimate software, and local governments would implement the same plan by the end of October.⁶⁴

INDIGENOUS INNOVATION

During this reporting year, foreign investors continued to raise concerns that China's indigenous innovation policy⁶⁵ for Chinese domestic development and ownership of technology is a means to force foreign companies to transfer their technology to China and a trade barrier, disadvantaging certain types of companies seeking

to access some of China's markets, particularly China's large government procurement market, including through discriminatory use of technical standards.⁶⁶ The U.S. Government raised these concerns at the December 2010 meeting of the JCCT, at which China made commitments concerning IPR and non-discrimination in its indigenous innovation policies.⁶⁷ At a meeting in January 2011 between U.S. President Barack Obama and Chinese President Hu Jintao, President Hu agreed that China would eliminate certain discriminatory innovation policies,⁶⁸ and at the third meeting of the U.S.-China Strategic and Economic Dialogue in May 2011, China committed to "eliminate all of its government procurement indigenous innovation products catalogues" ⁶⁹ The Ministry of Finance announced revocation of three discriminatory measures on government procurement effective July 1, 2011.⁷⁰ One commentator noted that the change does not "by its terms extend to sub-central agencies."⁷¹ Several provincial and municipal authorities, however, posted the Ministry of Finance announcement on their Web sites, or posted notices revoking related legislation.⁷²

Indigenous innovation has continued to play an important role in China's economic planning. In October 2010, the State Council issued the Decision on Accelerating Cultivation and Development of Strategic Emerging Industries,⁷³ presaging the strategic industries outlined in the 12th Five-Year Plan. The decision calls for cooperation with foreign companies and research centers, including encouraging them to set up research centers in China.⁷⁴ The American Chamber of Commerce in the People's Republic of China considers the decision as "an extension of the indigenous innovation drive and a complement to the 2006 [Medium- and Long-Range Plan for Development of Science and Technology]."⁷⁵ Further, Chapter 27 of the 12th Five-Year Plan, titled "Increase Science and Technical Innovation Capabilities," calls for continuation of indigenous innovation.⁷⁶ Article 3 of the chapter discusses "surrounding the enhancement of the capabilities of original innovation, integrated innovation, and of absorbing and re-innovating imported technologies" ⁷⁷

China and the World Trade Organization

China is an active member of the World Trade Organization (WTO). In the period since becoming a member in December 2001 through July 2011, China has been a respondent in 21 cases, complainant in 8, and a third-party participant in 78.⁷⁸ According to the 2010 U.S. Trade Representative (USTR) Report to Congress on China's WTO Compliance, there were six active disputes against China in 2010.⁷⁹

In September 2010, the United Steelworkers filed a Section 301 petition with USTR concerning China's support for its domestic wind energy industry, citing five areas.⁸⁰ In January 2011, the U.S. requested consultations with China at the WTO concerning China's provision of subsidies to Chinese wind turbine manufacturers through a "Special Fund for Industrialization of Wind Power Equipment."⁸¹ This was much narrower than the areas covered in the United Steelworkers' petition. In March, USTR indicated its preference to settle the dispute, and in June, USTR announced that China had ended the challenged subsidies.⁸² USTR noted dif-

ficulties uncovering subsidies given China's lack of transparency.⁸³ China is required to notify the WTO of subsidies on a regular basis, which it has failed to do.⁸⁴ Further, while USTR depends on companies to gather the information necessary for a trade case, companies often hesitate to do so, "fearing Chinese officials' reputation for retaliating against joint ventures in the country and potentially denying market access to any company that takes sides against China."⁸⁵ [See Investment Regulation—Foreign Investment in China in this section, concerning China's discretionary foreign investment approval procedures and annual inspection requirements.]

In September 2009, the United States imposed tariffs on certain passenger vehicle and truck tires from China in accordance with Article 16 of China's Protocol of Accession, which provides for a transitional product-specific safeguard mechanism to give temporary relief from "market disruption" to a domestic industry caused by a surge in imports from China.⁸⁶ Within days, China initiated proceedings at the WTO against the U.S. action, and in December 2010, the WTO panel decided against China.⁸⁷ China appealed the panel's decision, and in September 2011 the WTO Appellate Body upheld the panel's decision, once again finding against China.⁸⁸ The provision for the transitional product-specific safeguard mechanism will terminate 12 years after the date of China's WTO accession, in December 2013.⁸⁹

In a case concerning market access for certain publications and audiovisual products, including films for theatrical release, audiovisual home entertainment products, sound recordings, and publications, and foreign service providers that distribute publications and certain audiovisual home entertainment products, the WTO Appellate Body decided against China. China had until March 2011 to comply with the WTO decision, but failed to do so.⁹⁰ A USTR spokesman stated that the U.S. Government had "communicated its concerns to China, and is working to ensure that China promptly brings its measures into full compliance."⁹¹ In an August 2011 status report to the WTO, China noted that it had "made tremendous efforts" to implement the rulings, listing completed amendments to legislation and a draft amendment to the foreign investment guidance catalogue.⁹² [Concerning the amendment to the catalogue, see Investment Regulation—Foreign Investment in China, in this section.] The decision is complicated for China to implement, because it conflicts directly with China's restrictions on media. As one U.S. lawyer in China noted, "China's current policy is to strengthen control over domestic media and further restrict foreign access. Thus the WTO ruling is 180 degrees contrary to very strong current movements in Chinese policy."⁹³ [See Section II—Freedom of Expression for more information on Chinese government restrictions on media.]

In its report of October 2010, a WTO dispute panel rejected China's claims against the United States in a case China brought in 2008 concerning the United States' imposition of both anti-dumping and countervailing duties on four products from China (circular welded carbon quality steel pipe, certain new pneumatic off-the-road tires, light-walled rectangular pipe and tube, and laminated woven sacks) and certain other issues.⁹⁴ China appealed, con-

testing several of the panel's findings, including those concerning the concurrent application of both duties (i.e., "double remedy") and its standard as to when state-owned enterprises are "public bodies" for purposes of determining whether the government is providing subsidies.⁹⁵ In March 2011, the Appellate Body reversed in part the panel's decision, including its findings on double remedy, its standard for when SOEs are "public bodies," and certain other issues.⁹⁶ The U.S. Trade Representative, Ron Kirk, said that he was "deeply troubled" by the reversal, which, he said, "appears to be a clear case of overreaching by the Appellate Body,"⁹⁷ and the United States raised these concerns at the March 2011 meeting of the WTO Dispute Settlement Body.⁹⁸

In July 2011, the WTO decided against China in a case the United States initiated in 2009 concerning China's restraints on the export of various forms of bauxite, coke, fluor spar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc.⁹⁹ The export restraints at issue included "export quotas, export licensing requirements, and minimum export price requirements."¹⁰⁰ The WTO panel rejected China's defense that various restraints were permitted if needed to address a critical shortage, to conserve natural resources, and for environmental protection.¹⁰¹ China's central news agency, Xinhua, called the ruling "regrettable,"¹⁰² and in August 2011, China notified the WTO of its decision to appeal the ruling.¹⁰³

RARE EARTHS

The WTO case decided in July 2011 on China's export restraints did not cover exports of rare earths, minerals essential in a range of important industries, such as "advanced technology, renewable energy, electronics, and defense."¹⁰⁴ China has a number of measures in place to restrict exports of rare earths, under the rationale that restrictions are necessary for environmental reasons and to protect exhaustible resources.¹⁰⁵ The WTO panel rejected this argument in July's decision in the export restraints case¹⁰⁶ and, according to a spokesperson for the Office of the U.S. Trade Representative (USTR), USTR is "deeply troubled by China's use of market distorting export restrictions on raw materials including rare earths," especially in light of the WTO decision.¹⁰⁷ Within days of the WTO decision, China's Ministry of Commerce announced rare earth export quotas that restore 2011 levels to those of the 2010 quotas, but incorporate a new category, thereby effectively tightening the quota.¹⁰⁸

A five-year plan for the sector, announced in February 2011, includes "increased state oversight, raising environmental standards, a crackdown on smuggling, the closure of illegal mines and consolidation of rare earth producers."¹⁰⁹ Furthermore, Chinese authorities are instituting greater control by consolidating rare earth assets under state-owned companies.¹¹⁰

Currency

The value of the Chinese yuan continues to be of concern to policymakers inside and outside China. Since 2005, China has maintained an exchange rate system under which the value of the yuan

is tied to a basket of currencies.¹¹¹ Under this system, China's regulators allow the yuan to float against the U.S. dollar within a narrow band.¹¹² Chinese authorities control the value of the yuan in part because a revalued yuan would increase the cost of Chinese exports.¹¹³ This arguably raises trade issues. Article XV(4) of the General Agreement on Tariffs and Trade (GATT) provides that WTO members "shall not, by exchange action, frustrate the intent of the provisions of [the GATT], nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund."¹¹⁴ The Articles of Agreement of the International Monetary Fund (IMF) state that "each member shall . . . avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members[.]"¹¹⁵

One U.S. economist notes several reasons it is in China's interests to revalue the yuan: Revaluation would help China manage its rising inflation rate and help ease an asset bubble in real estate;¹¹⁶ revaluation would be in keeping with China's goal to shift from reliance on exports to reliance on consumption, as outlined in the 12th Five-Year Plan;¹¹⁷ and revaluation would benefit China's trading partners.¹¹⁸ Furthermore, in order to artificially keep the value of the yuan low, China must accumulate large reserves of foreign currency, which leads to market distortions.¹¹⁹

Against the backdrop of discussions concerning revaluation, some Chinese government departments have been urging liberalization of the exchange rate mechanism, including allowing wider use of the yuan internationally, or "internationalization."¹²⁰ An article in the Communist Party School newspaper, Study Times, in April 2011 called for making the yuan a reserve currency,¹²¹ suggesting five actions: Accelerating China's outbound investments, entering into currency exchange agreements, encouraging the use of yuan in trade, issuing yuan-based bonds, and making better use of finance centers such as Hong Kong.¹²² However, as China takes these steps to internationalize the yuan, analysts note the contradiction between internationalizing the yuan and not making it fully convertible.¹²³ Nonetheless, during this reporting year, Chinese authorities have made several moves on the internationalization of the yuan.¹²⁴

Investment Regulation

FOREIGN INVESTMENT IN CHINA

Foreign investment in China is highly regulated, and the Chinese government uses the approval process to ensure that foreign investment in China is in keeping with government policy. The two government departments with primary responsibility are the National Development and Reform Commission (NDRC), which formulates industrial policy and economic strategy, and the Ministry of Commerce (MOFCOM), which is responsible for approval of foreign investment in China. NDRC and MOFCOM in certain cases delegate authority to their counterparts at lower levels of government.¹²⁵ Approval is discretionary on the part of the approving authority. Most foreign investment in China must undergo a government approval process, with larger investments, or investments in

certain sectors, requiring approval at a higher level of government.¹²⁶ In February 2011, MOFCOM issued a Circular on Issues in the Administration of Foreign Investment, delegating some approvals to provincial-level departments and eliminating or simplifying other administrative requirements.¹²⁷ The Foreign Investment Guidance Catalogue, which is updated periodically, lists industries in which foreign investment is encouraged, restricted, or forbidden, including, in some cases, provisions concerning the structure, shareholding, or management of the investment.¹²⁸ (In addition to the foreign investment approval process, enterprises in China must undergo a governmental annual review process to maintain their business licenses.)¹²⁹

In April 2010, the State Council issued opinions that called for revising the catalogue to encourage foreign investment in “high-end manufacturing, ‘high-tech’ industries, modern services, new energy sources, and energy conservation and environmental protection sectors.”¹³⁰ The opinions’ introduction notes, “Utilizing foreign investment has always been an important part of China’s basic state policy of opening up,” and underscores the important role of foreign investment in scientific and technological innovation.¹³¹ The State Council issued a draft revision to the current 2007 catalogue in April 2011 which includes provisions adding the strategic industries listed in the 12th Five-Year Plan to the “encouraged” category.¹³²

In February 2011, the State Council issued the Circular on Establishing a Security Review System for Acquisitions of Domestic Enterprises by Foreign Investors, with the goal of guiding such acquisitions and protecting national security.¹³³ The security review applies to transactions involving foreign investors and domestic military industries, or military industry parts, or important enterprises near military facilities; or acquisitions through which foreign investors may acquire a controlling share in other entities relevant to national security, as well as entities providing important agricultural products, energy and natural resources, infrastructure, transportation services, key technologies, and major equipment manufacturers.¹³⁴ The security review will evaluate the effects of an acquisition on national security, the national economy, and society, and the research and design capabilities of important domestic technologies relevant to national security.¹³⁵ A panel to carry out security reviews will be established under the State Council, with the National Development and Reform Commission (NDRC) and MOFCOM in the lead.¹³⁶ Under the review procedure, a foreign investor must file an application with MOFCOM.¹³⁷ If MOFCOM finds that the acquisition should be subject to security review, MOFCOM will file a request with the panel.¹³⁸ Even if a foreign investor does not file for a review, the relevant Chinese industry association or government department can file for a review.¹³⁹ In March 2011, MOFCOM issued provisions, effective from March 5, 2011 to August 31, 2011, which provide procedural rules for a security review.¹⁴⁰

CHINA’S OUTBOUND INVESTMENT

Like foreign investment into China, China’s outbound investment is subject to a government approval process, with approval author-

ity under MOFCOM and the NDRC. MOFCOM measures issued in 2009 set out the approval process for outbound investment,¹⁴¹ generally requiring approval at higher government levels for larger investments. Relatively larger investments in the energy or mineral sectors can be approved at the provincial level, which expedites these transactions.¹⁴² In addition, certain large investments require the approval of the NDRC.¹⁴³ Outbound investments by central-level state-owned enterprises must make a filing with the NDRC.¹⁴⁴

As China encourages its companies to “go global” under the 12th Five-Year Plan,¹⁴⁵ Chinese government departments are revising regulation of outbound investments. MOFCOM and other departments are preparing draft regulations on outbound investment and foreign labor service cooperation, and there are discussions concerning regulations on foreign contracted projects.¹⁴⁶ In February, the National People’s Congress amended the Criminal Law to criminalize the giving of items of value to foreign governments or international organizations for purposes of obtaining improper commercial benefits.¹⁴⁷ The State-Owned Assets Supervision and Administration Commission issued two sets of interim measures on monitoring and supervising financial activities of the central-level state-owned enterprises (SOEs) offshore.¹⁴⁸

There are a number of avenues for SOEs to obtain financing for outbound investment, including loans by China’s state-owned banks, outbound investment funds, and use of yuan. According to a report in People’s Daily, the head of the China Nonferrous Metals Industry Association indicated that the government will certify enterprises that meet standards for mine exploration and development, which will be given priority when applying for loans.¹⁴⁹ According to a 2011 report by the Heritage Foundation, most funding for outbound investment has gone into energy and power, and at the end of 2010, there was a “rush of energy acquisition and plant construction deals. Metals draw the second-most investment, followed by finance and real estate.”¹⁵⁰ Though there have been allegations of subsidies for overseas investments, a MOFCOM official called the allegations “entirely groundless.”¹⁵¹ [For information on China’s liberalization of the yuan in outbound investment, see Currency in this section.]

Antimonopoly Law

In December 2010, two of the three Chinese government departments charged with enforcing the PRC Antimonopoly Law (AML) issued new regulations.¹⁵² The State Administration for Industry and Commerce (SAIC), which is responsible for regulating monopoly agreements and abuse of dominance not involving pricing, issued provisions prohibiting monopoly agreements,¹⁵³ provisions on abuse of dominance,¹⁵⁴ and provisions covering abuse of administrative power to restrict competition.¹⁵⁵ The NDRC, which covers monopoly agreements and abuse of dominance involving pricing, issued provisions on monopolies involving pricing¹⁵⁶ and enforcement procedures.¹⁵⁷ While four of these measures address business conduct, the SAIC provisions on abuse of administrative power could, if fully implemented, constrain abuse by local officials and allow freer movement of goods within China, both of which would

benefit Chinese consumers.¹⁵⁸ These regulations all took effect on February 1, 2011.

After issuing the new regulations, but before the effective date, SAIC imposed its first fine for a violation of the AML, in a case concerning a concrete cartel in Jiangsu province.¹⁵⁹ The cartel was organized by a trade association and resulted in concrete producers dividing the market.¹⁶⁰ In another case, Hudong, an online encyclopedia in China, filed a complaint with SAIC against Chinese search engine Baidu, alleging that Baidu abused its dominant position by ranking Hudong's Web site lower on search results. According to a report in China Daily, however, there have been at least three complaints against Baidu that Chinese regulators declined to pursue.¹⁶¹

In January 2011, the NDRC announced that the Zhejiang Provincial Price Bureau fined the Zhejiang Fuyang Paper Industry Association for price fixing.¹⁶² According to the announcement, the case was to be used as an example to educate other industry associations.¹⁶³ In one of the first administrative monopoly cases, in June 2011 the Guangdong provincial government found that the Heyuan Municipal People's Government violated the AML's provisions on administrative monopoly by restricting the promotion and sale of global positioning systems.¹⁶⁴ The administrative monopoly provisions of the AML forbid conduct by administrative departments to restrict competition or protect local businesses.¹⁶⁵

The U.S. business community in China has expressed concern that the AML may be used in ways that do not support consumer interests and market efficiency but may be "selectively or discriminatorily enforced to promote industrial policy and other ends."¹⁶⁶ This is of greatest concern in the context of merger reviews, which MOFCOM, the third government department charged with responsibility under the AML, handles. MOFCOM held up approval of an offshore transaction for the sale of Motorola's network assets to Nokia. Antitrust authorities in other jurisdictions, including the United States and European Union, had approved the deal.¹⁶⁷ One management consultant noted that the Chinese government may have been using the approval process as leverage because of controversy over Chinese telecommunications equipment suppliers that were not allowed access to the U.S. market.¹⁶⁸ In June, MOFCOM gave only a conditional approval to the merger of two Russian potash producers in a decision that made clear that MOFCOM would evaluate the effect of the merger on national economic development.¹⁶⁹

There have been no reports of MOFCOM not approving, or giving conditional approval to, mergers between Chinese companies. The State-Owned Assets Supervision and Administration Commission (SASAC) has encouraged the consolidation of state-owned enterprises (SOEs) in China (a process some industrial policies mandate, such as that for automobiles). For example, SASAC is consolidating China's two largest train manufacturers so that they do not compete with each other, especially in international markets.¹⁷⁰ SASAC is also consolidating the crucial rare earth industry so that there will be three companies with 80 percent of the rare earth market in southern China.¹⁷¹ Furthermore, the NDRC has formu-

lated a plan to adjust nine major industries in China to improve their efficiency.¹⁷²

Food Safety

During the 2011 reporting year, food safety problems persisted in China, with incidents ranging from exploding watermelons to toxic bean sprouts “soaked in banned additives” and poisonous pepper in Chongqing hotpots.¹⁷³ To address reporting of these incidents, the Ministry of Health (MOH) will create a media platform to provide public notifications of food safety issues.¹⁷⁴ In addition, however, MOH also said they will “blacklist” reporters who “mislead the public,” according to a Chinese media report.¹⁷⁵ The Chinese government has continued to develop its food safety system, as established under the 2009 PRC Food Safety Law, and the 12th Five-Year Plan on National Economic and Social Development devotes a section to food and drug safety, including the need for a tracing system, risk monitoring, and supervision.¹⁷⁶ In September 2010, the MOH passed the National Food Safety Standards, which took effect in December,¹⁷⁷ and in November, six government departments issued measures on disclosure of food safety information.¹⁷⁸ The central government is investing in improvements to local-level food inspection.¹⁷⁹ The State Council issued a comprehensive document on food safety work for 2011, which addresses cracking down on illegal behavior, improving supervision of food safety, and strengthening education.¹⁸⁰ In June, MOH banned the use of bisphenol-A (BPA) in infants’ milk bottles.¹⁸¹

Endnotes

¹A complete and up-to-date compilation of information on China's participation in the World Trade Organization (WTO), including principal accession documents (Working Party Report, Protocol of Accession, General Counsel decision), schedules, trade policy reviews, and dispute case documents can be found on the WTO Web site.

²Office of the U.S. Trade Representative, "2010 Report to Congress on China's WTO Compliance," December 2010, 2.

³*Ibid.*

⁴Office of the U.S. Trade Representative, "China Ends Wind Power Equipment Subsidies Challenged by the United States in WTO Dispute," 7 June 11. The World Trade Organization (WTO) Glossary defines transparency as the "[d]egree to which trade policies and practices, and the process by which they are established, are open and transparent. For a discussion of the principles of the WTO, including transparency, see World Trade Organization, "What Is the World Trade Organization," on the WTO Web site.

⁵World Trade Organization, Report of the Working Party on the Accession of China WT/ACC/CHN/49, 1 October 01, paras. 337–41.

⁶Office of the U.S. Trade Representative, "2010 Report to Congress on China's WTO Compliance," December 2010, 63. For a discussion of the process of China's accession to the Government Procurement Agreement, and of China's government procurement regime, see p. 63–67 of the report.

⁷Office of the U.S. Trade Representative, "2010 Report to Congress on China's WTO Compliance," December 2010, 2.

⁸Chen Zhiwu, Presentation on "Difficulty in Finding Compatibility Between State Ownership and Constitutionalism" [Guoyou zhi yu xianzheng fazhi nanyi jianrong], China University of Politics and Law, 22 May 09, reprinted in the Chenzhiwu blog, on Sohu, 5 June 09. For discussions of industrial policies in China, see Alexandra Harney, "Where's the Chinese Toyota?" Foreign Policy, 8 December 09; China's Industrial Policy and Its Impact on U.S. Companies, Workers, and the American Economy, Hearing of the U.S.-China Economic and Security Review Commission, 24 March 09, Testimony of Alan Wm. Wolff, Partner, Dewey & LeBoeuf, Washington, DC.

⁹American Chamber of Commerce in the People's Republic of China, "DC Outreach 2011: Market Access Challenges," 28 April 11.

¹⁰World Trade Organization, "Understanding the WTO: Principles of the Trade System," last visited 15 July 11. See also World Trade Organization, "Glossary," last visited 12 September 11, which defines "national treatment" as follows: "The principle of giving others the same treatment as one's own nationals. GATT Article 3 requires that imports be treated no less favorably than the same or similar domestically-produced goods once they have passed customs. GATS Article 17 and TRIPS Article 3 also deal with national treatment for services and intellectual property protection."

¹¹Office of the U.S. Trade Representative, "2010 Report to Congress on China's WTO Compliance," December 2010, 7.

¹²The term in Chinese is *guo jin min tui*. See "Wen Jiabao: Currently, the Problem of the So-Called 'the State Advances, the Private [Sector] Retreats' Does Not Exist in China" [Wen jiabao: muqian zhongguo bu cunzai suowei "guo jin min tui" wenti], China News Service, 14 March 11, which reports on Wen Jiabao refuting the belief that the state-owned sector is growing and squeezing out the private sector in China. See also Wang Xiaotian, "New Regulations To Encourage Private Sector," China Daily, 15 March 11.

¹³For more information, see Chen Zhiwu, Presentation on "Difficulty in Finding Compatibility Between State Ownership and Constitutionalism" [Guoyou zhi yu xianzheng fazhi nanyi jianrong], China University of Politics and Law, 22 May 09, reprinted in the Chenzhiwu blog, on Sohu, 5 June 09.

¹⁴World Trade Organization, Protocol on the Accession of the People's Republic of China, WT/L/432, 10 November 01, Part I, 2(C).

¹⁵Office of the U.S. Trade Representative, "2010 Report to Congress on China's WTO Compliance," December 2010, 8–9, 58–59.

¹⁶US-China Business Council, "PRC Transparency Tracking," updated April 2011, 1.

¹⁷U.S. Department of Treasury, "The 2011 U.S.-China Strategic and Economic Dialogue U.S. Fact Sheet—Economic Track," 10 May 11.

¹⁸*Ibid.*

¹⁹Export-Import Bank of the United States, "Report to the U.S. Congress on Export Credit Competition and The Export-Import Bank of the United States," June 2011, 108.

²⁰OECD, Trade and Agriculture Directorate, Arrangement on Export Credits, last visited on 27 September 11. According to p. 108 of the Export-Import Bank of the United States' June 2011 "Report to the U.S. Congress on Export Credit Competition and The Export-Import Bank of the United States": "as China is not a member of any part of the OECD, none of China's ECAs are under any obligation to follow the OECD Arrangement on Export Credits, which sets the guidelines for official export credits." For a discussion of the operations of China's ECAs, see p. 108–13 of the report.

²¹Export-Import Bank of the United States, "Report to the U.S. Congress on Export Credit Competition and The Export-Import Bank of the United States," June 2011, 109.

²²U.S. Department of Treasury, "Third Meeting of the U.S.-China Strategic & Economic Dialogue Joint U.S.-China Economic Track Fact Sheet," 10 May 11.

²³Office of the U.S. Trade Representative, "2010 Report to Congress On China's WTO Compliance," December 10, 59–60.

²⁴Chinese State-Owned Enterprises and U.S.-China Bilateral Investment, Hearing of the U.S.-China Economic and Security Review Commission, 30 March 11, Testimony of Derek Scissors, Research Fellow, Heritage Foundation.

²⁵ Ibid.

²⁶ Article 10 of the PRC Constitution provides that land in the cities is owned by the state, and land in the rural and suburban areas is owned by the collectives, except for those portions which belong to the state. PRC Constitution, adopted 4 December 82, amended 12 April 88, 29 March 93, 15 March 99, 14 March 04, art. 10.

²⁷ Zhiwu Chen, Presentation on "Economic Consequences of State Capitalism," Brookings Institution, 1 March 11.

²⁸ Ibid.

²⁹ State-Owned Assets Supervision and Administration Commission, Provisional Regulations on Protection of Commercial Secrets of Central-Level State-Owned Enterprises [Zhongyang qiye shangye mimi baohu zanzing guiding], issued and effective 26 April 10.

³⁰ PRC Law on the Protection of State Secrets [Zhonghua renmin gongheguo baoshou guojia mimi fa], issued 5 September 88, revised 29 April 10, effective 1 October 10.

³¹ For a discussion on state secrets and commercial secrets, see Baker & McKenzie, "Client Alert: Latest Developments on China's State Secrets and Trade Secrets Regime," August 2010. For additional information on China's commercial secrets regulations, see "SASAC Issues New Commercial Secrets Regulations," CECC China Human Rights and Rule of Law Update, No. 8, 9 November 10, 2. For information on state secrets legislation, see "National People's Congress Standing Committee Issues Revised State Secrets Law," CECC China Human Rights and Rule of Law Update, No. 5, 4 June 10, 2.

³² Baker & McKenzie, "Client Alert: Latest Developments on China's State Secrets and Trade Secrets Regime," August 2010; "SASAC Issues New Commercial Secrets Regulations," CECC China Human Rights and Rule of Law Update, No. 8, 9 November 10, 2. Article 11 of the Interim Provisions on the Protection of Commercial Secrets of Central Enterprises provides that commercial secrets should be changed to state secrets when the scope of state secrets has been adjusted. State-Owned Assets Supervision and Administration Commission, Interim Provisions on the Protection of Commercial Secrets of Central Enterprises, issued and effective 26 April 10, art. 11.

³³ Sigrid Ursula Jernudd, "China, State Secrets, and the Case of Xue Feng: the Implication for International Trade," Chicago Journal of International Law, Vol. 12, No. 1 (2011), 309–39.

³⁴ "Beijing Court Sentences American Geologist to Eight Years for State Secrets," CECC China Human Rights and Rule of Law Update, No. 7, 19 August 10, 2.

³⁵ Andrew Jacobs, "China Upholds Conviction of American Geologist," New York Times, 18 February 11. See also "Beijing Court Upholds Eight-Year Sentence for American Geologist Xue Feng," Congressional-Executive Commission on China, 23 February 11.

³⁶ Andrew Jacobs, "China Upholds Conviction of American Geologist," New York Times, 18 February 11. According to Article 9 of the PRC Constitution, mineral resources and other natural resources are owned by the state. PRC Constitution, issued and effective 4 December 82, amended 12 April 88, 29 March 93, 15 March 99, 14 March 04, art. 9.

³⁷ State Council, Interim Regulations on Supervision and Management of State-Owned Assets of Enterprises, issued and effective 27 May 03, art. 43.

³⁸ A 2007 study by Chinascope found that the SOEs are held by a three-tier ownership structure, with the Communist Party appointing senior management at each tier. "Piercing the Corporate Veil," Chinascope, 29 December 07. For information on the role of the Communist Party Central Organization Department in appointing management of China's state-owned enterprises, see Richard McGregor, "The Party Organiser," Financial Times, 30 September 09. According to McGregor, an equivalent imaginary department in the United States "would oversee the appointments of U.S. state governors and their deputies; the mayors of big cities; heads of federal regulatory agencies; the chief executives of General Electric, ExxonMobil, Walmart and 50-odd of the remaining largest companies; justices on the Supreme Court; the editors of The New York Times, The Wall Street Journal and The Washington Post, the bosses of the television networks and cable stations, the presidents of Yale and Harvard and other big universities and the heads of think-tanks such as the Brookings Institution and the Heritage Foundation." The role of the Party in decisionmaking in the state-owned enterprises was delineated in the Chinese Communist Party Central Committee General Office and State Council General Office Opinions Concerning Promoting Further Implementation of the "Three Major One Large" Decisionmaking System in the State-Owned Enterprises [Guanyu jinyibu tuijin guoyou qiye guancheluoshi "sanchong yi da" juece zhidu de yijian], 15 July 10. The opinions provide procedures that must be followed in making important decisions, important appointments, and usage of large amounts of government funds.

³⁹ For examples, see "China Civil Engineering Corporation's Practice and Exploring Party Building Overseas" [Zhongtu jituan haiwai dangjian de shijian yu tansuo], Fujian Net, 28 December 10; "Study Times: Overseas Expansion of the Party," Study Times, summarized by Chinascope, 27 December 10; "Research Group for the (Group) Company's Party Building Efforts in Overseas Programs" [Jituan gongsi haiwai gongcheng xiangmu dang jian gongzuo diaoyanzu dao gongsi diaoyan], CR17BG [China Railway 17 Group] No. 3 Engineering Co., Ltd. [Zhong tie shiqi ju jituan di san gongcheng youxian gongsi], 13 May 11. Commission staff have found references to a Party document entitled "Leading Opinion on Strengthening Work on Party Building in Overseas Organizations" [Guanyu jiaqiang haiwai jigou dangjian gongzuo de zhidao yijian], but have not found the original document. See, e.g., "China Water Resources Construction Group: Forging a 'Go Outward' Hydroelectric Power Leading Enterprise" [Zhongguo shuidian dazao "zou chuqu" de shuidian ling jun qiye], People's Daily, reprinted in Ministry of Commerce, Outward Investment and Economic Cooperation, 22 October 09.

⁴⁰ "Shandong International Economic and Technical Cooperation Company: Strengthening the Work of Party-Building in Projects Overseas" [Zhongguo shandong guoji jingji jishu hezuo gongsi jiaqiang haiwai xiangmu dangjian gongzuo], State-Owned Assets Supervision and Administration Commission, 29 September 10.

⁴¹State Council, Relevant Policies for Further Encouraging Development of the Software Industry and Integrated Circuit Industry [Jinyibu guli ruanjian chanye he jicheng dianlu chanye fazhan ruogan zhengce de tongzhi], issued 28 January 11; National Development and Reform Commission, Automotive Industry Development Policy [Qiche chanye fazhan zhengce], issued 21 May 04, revised 15 August 09, effective 1 September 09. “Cultural industry” covers a range of sectors, from filmmaking to printing. For the range of covered sectors, see Central People’s Government, “Plan To Invigorate the Cultural Industry” [Wenhua chanye zhenxing guihua], issued 26 September 09, art. 3, para. 1.

⁴²See, e.g., National Development and Reform Commission, Automotive Industry Development Policy [Qiche chanye fazhan zhengce], issued 21 May 04, revised 15 August 09, effective 1 September 09, art. 7. Article 7 states in part, “The principle of combining imported technology and independent research and development shall be pursued. [The industry] shall follow and study advanced international technologies, actively engage in international cooperation, and develop appropriate and advanced technologies that shall be eligible for intellectual property rights. Products using imported technologies shall be competitive internationally and meet the compulsive requirements of international automotive technical standards.” Article 4 provides in part for the formation by 2010 of a few large auto manufacturers, which would rank among the top 500 companies. See also American Chamber of Commerce in the People’s Republic of China, Business in China 2011 White Paper, (2011), 64; Under Secretary Robert D. Hormats, U.S. Department of State, Remarks at Amcham-China’s Annual DC Dialogue, Washington, DC, 3 May 11.

⁴³National People’s Congress, PRC Outline of the 12th Five-Year Plan on National Economic and Social Development [Zhonghua renmin gongheguo guomin jingji he shehui fazhan di shier ge wunian guihua gangyao], passed 14 March 11, issued 16 March 11, chap. 10, secs. 1, 3.

⁴⁴See, e.g., “MIIT Drafts 12th Five-Year Plan for New Chemical Materials” [Gongxin bu zhiding huagong xin cailiao “shier wu” guihua], *Caijing*, 22 April 11; “12th Five-Year Plan for Civil Aviation Development Released,” *Shanghai Securities News*, 12 April 11.

⁴⁵State Council, Relevant Policies for Further Encouraging Development of the Software Industry and Integrated Circuit Industry [Jinyibu guli ruanjian chanye he jicheng dianlu chanye fazhan ruogan zhengce de tongzhi], issued 28 January 11. For a discussion of the policies and their background, see DLA Piper, “China Offers New Incentives To Further Boost Software and Semiconductor Industries,” *International Tax Newsletter*, 22 March 11.

⁴⁶State Council, Relevant Policies for Further Encouraging Development of the Software Industry and Integrated Circuit Industry [Jinyibu guli ruanjian chanye he jicheng dianlu chanye fazhan ruogan zhengce], issued 28 January 11, preamble.

⁴⁷See CECC, 2004 Annual Report, 5 October 04, 86; World Trade Organization, DS309, China-Value-Added Tax on Integrated Circuits, Notification of Mutually Agreed Solution, Doc. No. 05-4494, 6 October 05.

⁴⁸National Development and Reform Commission and Ministry of Commerce, Foreign Investment Industry Guidance Catalogue (Revised 2007) [Waishang touzi chanye zhidao mulu (2007 nian xiuding)], issued 31 October 07, effective 1 December 07, Catalogue of Industries in Which Foreign Investment Is Encouraged, arts. 3(21)(vi) and 3(21)(xiv); State Council Legislative Affairs Office, Circular Concerning Publicly Soliciting Opinions on Foreign Investment Industry Guidance Catalogue (Revised Draft for Comments) [Guanyu “waishang touzi chanye zhidao mulu (xiuding zhengqiu yijian gao)” gongkai zhengqiu yijian de tongzhi], 1 April 11, Catalogue of Industries in Which Foreign Investment Is Encouraged, arts. 3(21)(iv), 3(21)(xi).

⁴⁹State Council Legislative Affairs Office, Circular Concerning Publicly Soliciting Opinions on “Foreign Investment Industry Guidance Catalogue (Revised Draft for Comments)” [Guanyu “waishang touzi chanye zhidao mulu (xiuding zhengqiu yijian gao)” gongkai zhengqiu yijian de tongzhi], issued 1 April 11, Catalogue of Industries in Which Foreign Investment Is Encouraged, art. 3(21)(xxviii).

⁵⁰American Chamber of Commerce in the People’s Republic of China, *American Business in China 2011 White Paper*, (2011), 72–82.

⁵¹See, e.g., Chapter 27 of the 12th Five-Year Plan, which states in Article 4 that, “There will be encouragement for the adoption and promotion of technological standards with indigenous innovation intellectual property right.” National People’s Congress, PRC Outline of the 12th Five-Year Plan on National Economic and Social Development [Zhonghua renmin gongheguo guomin jingji he shehui fazhan di shier ge wunian guihua gangyao], passed 14 March 11, issued 16 March 11, chap. 27.

⁵²On intellectual property (IP) issues in standards setting, and on IP issues in the Antimonopoly Law, see American Chamber of Commerce in the People’s Republic of China, *American Business in China 2011 White Paper*, (2011), 86–88, and 48–50, respectively.

⁵³State Council General Office Circular Concerning the Program for Special Campaign on Combating Intellectual Property Rights Infringement and Manufacture and Sales of Counterfeiting and Shoddy Commodities [Guowuyuan bangongting guanyu daji qinfan zhishi chanquan he zhishou jiaomaoweilie shangpin zhuanxiang xingdong fang’an de tongzhi], issued 27 October 10; “China Cracks Down on Online Copyright Infringements and Counterfeits,” *People’s Daily*, 7 April 11.

⁵⁴State Council General Office Circular Concerning Adjusting the Ending Date of the Special Campaign on Combating Intellectual Property Rights Infringement and Manufacture and Sales of Counterfeit and Shoddy Commodities [Guowuyuan bangongting guanyu tiaozheng daji qinfan zhishi chanquan he zhishou jiaomaoweilie shangpin zhuanxiang xingdong jieshu shijian de tongzhi], issued 10 March 11.

⁵⁵Ministry of Commerce, “Nine Government Departments Together Attack Illegal Acts of Intellectual Property Rights Infringement and Shoddy Goods Online” [Jiu bumen lianshou daji wangluo gouwu lingyu qinfan zhishi chanquan he jiaomaoweilie shangpin weifa fanzui xingwei], 31 December 10.

⁵⁶“Baidu To Introduce Anti-Piracy Technology for Books Product,” Reuters, 24 March 11. See also Office of the U.S. Trade Representative, “2011 Special 301 Report,” April 2011, 20–21. Concerning Baidu and copyright infringement, see “Baidu Accused Over Copyright Infringement,” CNTV, reprinted in China Internet Information Center, 28 March 11; “Shame on Baidu,” Han Han Digest, 25 March 11.

⁵⁷Intellectual Property Protection in China, “Shanghai Focused on Combating Intellectual Property Infringement in Cultural Markets,” 18 March 11. For information on China’s support of its cultural industry in general, see CECC, 2010 Annual Report, 10 October 10, 179–80.

⁵⁸Intellectual Property Protection in China, “The State Council To Encourage the Development of Software Industry and Stress IPR Protection,” 15 February 11.

⁵⁹State Council, General Office Circular Concerning the Program for Special Campaign on Combating Intellectual Property Rights Infringement and Manufacture and Sales of Counterfeiting and Shoddy Commodities [Guowuyuan bangongting guanyu daji qinfan zhishi chanquan he zhishou jiaomaoweilie shangping zhuanxiang xingdong fang’an de tongzhi], issued 27 October 10; “New Rules To Fight Online Pirates,” China Daily, reprinted in Intellectual Property Protection in China, 17 March 11.

⁶⁰American Chamber of Commerce in the People’s Republic of China, American Business in China 2011 White Paper, (2011), 5. The white paper reports that in the 2011 Amcham-China Business Climate Survey, infringement of intellectual property rights was reported as one of the top five business challenges by 24 percent of respondents.

⁶¹Office of the U.S. Trade Representative, “USTR Releases Annual Special 301 Report on Intellectual Property Rights,” May 2011. For a detailed discussion of intellectual property enforcement campaigns and of legislative developments in China, see Office of the U.S. Trade Representative, “2011 Special 301 Report,” April 2011, 19–23.

⁶²“Key Excerpt From Vice Premier Wang Qishan’s Dec. 15 Statement at Conclusion of 21st JCCT,” China Trade Extra, 15 December 10. For additional details, see Ministry of Commerce, “21st JCCT Successfully Held in Washington” [Di ershiyi jie zhong mei shang mao lian wei hui zai meiguo huashengdun chenggong juxing], 16 December 10; U.S. Department of Commerce, “21st U.S.-China Joint Commission on Commerce and Trade Fact Sheet,” 20 December 10.

⁶³Office of the Press Secretary, White House, “Fact Sheet: U.S.-China Economic Issues,” 19 January 11.

⁶⁴“Central-Level Departments Already Spent 1.3 Billion Yuan To Buy Genuine Software” [Zhongyang guojia jiguan yi huafei yue 13 yi yuan yongyu goumai zhengban ruanjian], Global Times, 22 February 11; “Govt Ban on Illegal Software Gains Pace,” China Daily, reprinted in Intellectual Property Protection in China, 18 January 11. For a discussion of a pilot program on software legalization, see the China Daily article.

⁶⁵For a discussion of China’s indigenous innovation policy, see CECC, 2010 Annual Report, 10 October 10, 182–83.

⁶⁶American Chamber of Commerce in the People’s Republic of China, American Business in China 2011 White Paper, (2011), 64–70. See also chapter 27, article 4 of the 12th Five-Year Plan, which provides, “There will be encouragement for the adoption and promotion of technological standards with indigenous innovation intellectual property right.” National People’s Congress, PRC Outline of the 12th Five-Year Plan on National Economic and Social Development [Zhonghua renmin gongheguo guomin jingji he shehui fazhan di shier ge wunian guihua gangyao], passed 14 March 11, issued 16 March 11. In his January 2011 visit to the United States, President Hu Jintao committed that China would not “link its innovation policies to the provision of government procurement preferences.” Office of the U.S. Trade Representative, “2011 Special 301 Report,” April 2011, 24.

⁶⁷U.S. Department of Commerce, “21st U.S.-China Joint Commission on Commerce and Trade Fact Sheet,” 15 December 10.

⁶⁸Office of the Press Secretary, White House, “Fact Sheet: U.S.-China Economic Issues,” 19 January 11.

⁶⁹U.S. Department of Treasury, “Third Meeting of the U.S.-China Strategic & Economic Dialogue Joint U.S.-China Economic Track Fact Sheet,” 10 May 11.

⁷⁰Ministry of Finance, Circular on Ceasing Implementation of Three Documents, Including “Measures on Handling the Budget for Government Procurement of Indigenous Innovation Products” [Guanyu tingzhi zhixing “zizhu chuangxin chanpin zhengfu caigou yusuan guanli banfa” deng san ge wenjian de tongzhi], announced 23 June 11, effective 1 July 11. For a discussion of the three documents, see “China Announces Revocation of Three Measures Favoring the Procurement of ‘Indigenous Innovation’ Products,” Mayer Brown Legal Update, 6 July 11.

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¹⁷⁸ Administrative Measures on Food Safety Information Disclosure [Shipin anquan xinxi gongbu guanli banfa], issued 3 November 10.

¹⁷⁹ Qiu Bo, "County Focus To Ensure Food Safety," China Daily, 3 January 11.

¹⁸⁰ "State Council Arranges Key Works on Food Safety in 2011" [Guowuyuan anpai 2011 nian shipin anquan zhongdian gongzuo], Caijing, 25 March 11.

¹⁸¹ Ministry of Health, Ministry of Industry and Information Technology, Ministry of Commerce, State Administration for Industry and Commerce, General Administration of Quality Supervision and Quarantine, State Food and Drug Administration, Announcement of Six Agencies Including the Ministry of Health Concerning Banning the Use of Bisphenol A in Infant Milk Bottles [Weishengbu deng 6 bumen guanyu jin zhi shuangfen A yongyu ying you'er naiping de gonggao], issued 23 May 11, effective for manufacturing 1 June 11, effective for import and sale 1 September 11. See also "Ministry of Health Issues Draft Ban on the Use of BPA in Infant Food Containers (Update)" Congressional-Executive Commission on China, 24 May 11, updated 9 June 11.

